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IN THE

Supreme Court of the United States

October Term, 1964
Nos. 648 and 659

No. 648

DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL POWER COMMISSION, PACIFIC POWER & LIGHT CO.,

Respondents.

No. 569

PACIFIC POWER & LIGHT CO.,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

Reply Brief of Department of Fish and Game of the State of California, Petitioner (No. 648).

Argument.

1. No further proceedings before the Federal Power Commission (hereinafter "Commission") are required to make the issues tendered by the petition of the Department of Fish and Game of the State of California (hereinafter "Department") presently ripe for consideration by this Court.[1] Should the Court agree with us that the Commission should have ordered Pacific

[1]This Court, with its plenary jurisdiction over lower federal courts, has the power to review a decision of the federal Court of Appeals that might not be final for the purposes of permitting review by this Court had the decision come up from a state court. See Stern and Gressman, *Supreme Court Practice* 18-19 (3d. ed. 1962).

Power & Light Co. (hereinafter "Licensee") to bear all operation and maintenance costs for all fishery facilities at Iron Gate, then no further proceedings before the Commission will be required.

We contend, in part, that the Department by a 1959 agreement with Pacific did not agree to bear operation and maintenance costs for the fish trapping and egg collecting facilities, so that the question of who should bear those costs was left open for the Commission's later determination. In contrast to the Commission's present assertion that "the Commission itself did not undertake to construe that agreement" (FPC Brief, p. 8,n.3), we are now simply asking this Court to affirm in that respect the Commission's own construction of that 1959 agreement as not precluding the question of who should bear operation and maintenance costs. See Dept. Pet. App., pp. 34A,n.18, 38A (art. 50(C)), and 48A (last full par.); *cf.* p. 16A.

But even if the Court should disagree with us and the Commission as to the proper construction of the 1959 agreement on this question, the issue of the burden of the operation and maintenance costs for the fish hatchery facilities would still have to be decided. Nothing the Commission may hereafter decide can make that issue disappear.

Hence, further proceedings before the Commission, if any, will not erase the necessity of the Court's deciding the important issues raised by our petition relating to significant recreational resources and commercial potentials of many rivers in California and in other states.[2]

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[2]In footnote 12, p. 17, of our petition, where we list the major salmon producing streams in California, we inadvertently omitted the Sacramento River. Anadromous fish can be, of course, an important commercial as well as recreational resource.

2. Our position that Licensee must be required to bear all operation and maintenance costs for all fishery facilities at Iron Gate would *not,* if carried to its logical conclusion "mean that an application for an FPC license must be denied unless the applicant is willing to construct and maintain flood control, navigation, recreation and/or other facilities, even if the costs involved might exceed by many times the advantages of the power project", as the Commission now contends (FPC Brief, p. 9). The Commission's contention misconceives its own decision and misconstrues our position.

In the pending case, the Commission has already impliedly determined, by ordering their construction, that the fishery facilities in question are required for comprehensive development under section 10(a) of the Federal Power Act. The 20 percent of operation and maintenance costs for those facilities that the Commission would impose upon the Department and that we say should be borne by Licensee (so that Licensee would bear 100 percent) would amount according to the Commission's own figures to "no more than approximately $10,000 a year" (FPC Brief, p. 11). Since Iron Gate is a multimillion dollar project (Dept. Pet. App., p. 43A), it cannot rationally be argued, nor does the Commission contend (as we noted in our petition, p. 16) that imposition of this additional 20 percent upon Licensee would render the project infeasible.

Even if Iron Gate would improve the fishery resource of the Klamath River (a determination not supported by one iota of evidence in the record), section 10(a) of the Federal Power Act expressly provides that the Commission must require of its licensee a plan best adapted to

"improving or developing" the waterway. In this context, therefore, the "gift horse" that the Commission's brief would attribute to the Department (FPC Brief, p. 11,n.4) would seem to belong to the Licensee. But this is a gift that the Commission has no authority to give to Licensee, and certain not at the expense of the State of California.

Conclusion.

The petition for a writ of certiorari of the Department (No. 648) should be granted.

The conditional cross-petition of Licensee (No. 659) should be denied.

Dated: December 18, 1964

Respectfully submitted,

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